

IN THE SUPREME COURT OF SEYCHELLES

Criminal Side: CN 38/2013

Appeal from Magistrates Court decision 737/2012

[2013] SCSC 3

HENDRICK JOUANEAU
Appellant

Versus

THE REPUBLIC

Heard: 16 January, 2014
Counsel: Mr. Durup for appellant
Mr. Robert, Attorney General for the Republic
Delivered: 16 January 2014

JUDGMENT

McKee J

- [1] The Appellant was originally charged with the offence of attempting to commit the felony of robbery contrary to section 378 of the Penal Code.
- [2] The Charge was later amended to Attempted Robbery contrary to section 282 of the Penal Code.
- [3] The Particulars of the offence remained the same and are as follows:

- [4] Hendrick Jouaneau, residing at Roche Caiman, Mahe, on the 17th November 2012 at Mont Fleuri, Mahe, attempted to rob Sharon Cadeau of one gold necklace with pendant, valued at Rs 2500 being the property of the said Sharon Cadeau.
- [5] The Appellant first appeared in court on 19th November 2012. On 21st January 2013 the Appellant tendered a plea of Not Guilty. The matter continued in the court until 18th March 2013 when the Appellant intimated that he wished to change his plea to one of Guilty. The charge was again put to the Appellant and he pleaded Guilty to the charge. He agreed the brief facts and was formally convicted of the charge of Attempted Robbery contrary to section 282 of the Penal Code. The Record of Previous Convictions shows a previous conviction for the offence of Stealing in September 2009 and that the Appellant was sentenced to a term of imprisonment of 2 years. The Appellant agreed the previous conviction. The Senior Magistrate gave her Reasons for Sentence. She took into account the plea of guilty and other short mitigation. She referred to the previous conviction and considered that this type of offence was “*rampant*” in the country. She considered that there were no extenuating circumstances which would allow her to consider a sentence less than the minimum mandatory sentence prescribed by statute and imposed a term of fifteen [15] years imprisonment for the offence of attempted robbery contrary to section 282 of the Penal Code.
- [6] It is against this sentence that the Appellant now appeals.
- [7] In this appeal the Appellant is represented by Mr. Rene Durup under the Legal Aid Scheme.
- [8] The thrust of the Appellant’s grounds of appeal is that there was impropriety and irregularity at the time the Appellant tendered his plea of Guilty on 18th March 2013 and that the sentence was too harsh.
- [9] The Respondent submitted that no such impropriety or irregularity existed. The Senior Magistrate had ensured that the Appellant was aware of the possible result of a plea of guilty, namely a loss of liberty, and that at all times she had to be aware that her responsibilities did not stretch into the area of providing formal legal advice to the

Appellant. The Respondent further argued that the Senior Magistrate had imposed the minimum mandatory sentence allowed by the law at the date of the offence and that this case did not show any special circumstances allowing a deviation from the normal tariff. The sentence was appropriate and lawful.

[10] At the oral hearing of the appeal I asked both counsel, Mr. Roberts and Mr. Durup if they considered that section 6 of the Criminal Procedure Code had a bearing on sentence. Mr. Durup had nothing to say on the point. Mr. Roberts took the view that the Senior Magistrate was entitled to impose the sentence of 15 years imprisonment or, in the alternative, if this court decided against him on that, this court itself was entitled to confirm the sentence at 15 years imprisonment.

[11] CONSIDERATION OF THE SUBMISSIONS.

[12] I consider the submission that there was some impropriety or irregularity in the court proceedings leading to the plea of guilty. I have read the Notes. The Appellant was informed of his constitutional rights at the first hearing. He elected to apply for legal aid and the procedure was explained. He was offered bail but failed to meet the conditions and was remanded in custody. By December 2012 Mr. Chetty had been appointed to represent the Appellant and he was served with the papers in the case. In January 2013 the Appellant, represented by Mr. Chetty in court, entered a plea of not guilty and a date of 7th May was set for trial. The Appellant failed to meet the bail conditions and continued on remand. At one of the remand hearings, namely the 18th March 2013, the accused in person advised the court that he wished to plead anew and, while he wished Mr. Chetty to be there, the counsel was absent. It is to be noted that this date was prior to the date fixed for trial. We have no way of knowing what went on between the Appellant and Mr. Chetty prior to this hearing date. The Senior Magistrate took the Appellant's statement to mean that he, of his own volition, had decided to change his plea. The record shows that since the offence was considered serious the most probable result would be a term of imprisonment and that there was a minimum mandatory sentence. She then confirmed that he fully understood the probable consequences of a plea of guilty. The Appellant stated he understood but maintained he wished to change his plea. Only

then was the charge re-read. In my view it was difficult for the Senior Magistrate to go beyond that point without, as Mr. Roberts states, straying into the province taken by a defence counsel. I find that the Senior Magistrate did all that was required in the situation and I find that there was no impropriety or irregularity on her part. That ground of appeal fails.

[13] The remaining ground of appeal relates to the imposition of the minimum mandatory sentence of 15 years imprisonment.

[14] I have looked at the history of the provisions relating to minimum mandatory sentences. Briefly the position is as follows.

[15] Prior to 1995 section 27 of the Penal Code [P/C] stated general provisions in respect of sentences which were found in the various sections of the P/C relating to specific offences.

[16] The amendment Act No. 16 of 1995 provided at a new section – section 27A – for minimum sentences relating to Chapters XXVIII or XXIX.

[17] The existing printed version of the P/C indicates that by an Act No 20 of 2010 further amendments were made.

[18] As Mr. Roberts states, there was a further amending Act, No 5 of 2012 which came into force on 30th July 2012. This brought Chapter XXVI into the ambit of the minimum mandatory sentencing provisions. Since section 282 is within Chapter XXVIII the Senior Magistrate held that these provisions relate to this Appellant and this offence.

[19] The case of Jean Frederick Ponoo v The Attorney General [SCA38/2010] [the Ponoo case] is also worthy of consideration in this matter. This judgment was issued in December 2011 and was hence between the dates of the second and third amending acts. The difference brought about by the 2012 amendment in relation to this appeal was that the term of imprisonment for a first offender convicted of the offence of attempted robbery was increased from 10 years to 15 years. In the Ponoo case the magistrate felt that she must follow the legislative guidelines regardless of other considerations. The

Appeal Court, in its general considerations, by reference to the South African cases of Dodo and Dow [paragraph 25 of its judgment] held that a court could “*depart from the mandatory sentence for reasons of substantial and compelling circumstances*”. At paragraph 37 of its judgment the Appeal Court held that the question is whether the mandatory minimum passes the legal test, the judicial test or the fair trial test. Further at paragraph 48 at sentences 2 and 3 the Appeal Court held that “While the power of Parliament to legislate remains absolute, likewise the power of the court to interpret the law and mete out sentence remains absolute”. Further at paragraph 59 there is reference to a statement of Lord Bingham in the case of “*Khoyratty*”. “*The function of independent judges charged to interpret and apply the law is universally recognized as a cardinal feature of the modern democratic state, a cornerstone of the rule of law itself.*”

[20] Hence while the Ponoo case considered matters specific to that case it also explored more general principles relating to mandatory minimum sentencing and factors which could affect the legislative provisions.

[21] In the light of the Ponoo case I felt that I should explore further and whether there may be any substantial and compelling circumstances which may give rise to a departure from the minimum mandatory sentence in this matter.

[22] This led me to the provisions of sections 5 and 6 of the Criminal Procedure Code. For ease of reference I set out the sections below and they read as follows:

[23] “[5] *The Supreme Court may pass any sentence authorised by law.*”

[24] [6](1) *The Magistrates’ Court when presided over by a Senior Magistrate may pass any sentence authorized by law:*

Provided that such sentence shall not exceed , in the case of imprisonment, 10 years, and in the case of a fine SR100,000.

[25] [6](2)*The Magistrates Court when presided over by a Magistrate other than a Senior Magistrate may pass any sentence authorized by law:*

Provided that such sentence shall not exceed, in the case of imprisonment, 8 years, and in the case of a fine, SR 75,000.

- [26] My investigations have not shown there to be any recent amendments to this provision which was the law in force as a 31st July 2011 in the latest copy of the Criminal Procedure Code.
- [27] These provisions establish and recognise 2 levels in the court system, that of the Supreme Court and that of the Magistrates Court. In the case of the Supreme Court there is no specific limit defined in respect of the powers of sentencing. However section 6 recognises the subordinate nature of the Magistrates Court and sets jurisdictional limits on its power of sentencing.
- [28] In the present matter the Senior Magistrate imposed a term of 15 years imprisonment under the minimum mandatory sentencing provisions which was however in excess of her sentencing limit of 10 years imprisonment prescribed in section 6 of the Criminal Procedure Code.
- [29] I look further afield for guidance in a situation where a court with prescribed jurisdictional limits on sentencing considers that an accused warrants a sentence in excess of this limit. I look to Hong Kong. In this territory there are 3 levels of courts, the Magistrates Court, the District Court and the Supreme Court. The court most similar to the Magistrates Court of Seychelles is the District Court of Hong Kong. It was established in 1953. A judge of the District Court has a civil and criminal jurisdiction. The District Court lies between the Magistrates Court and the Supreme Court and can deal with serious criminal offences with the exception of murder, manslaughter and rape. The maximum term it can impose is 7 years imprisonment.
- [30] Over the years a considerable body of law has evolved on the topic of “Sentencing Jurisdiction”.
- [31] I look to the Hong Kong case, *HKSAR v Li Yan* (1998) 4 HKR 12, 14 which is referred to in Cross and Cheung’s “Sentencing in Hong Kong” 6th Edition, Chapter 42 at pages 565 to 569, and in particular to the following paragraph:

[32] “When the Court of Appeal considered the approach to discounts and jurisdictional limits in **HKSAR v Li Yan [1998] 4 HKR 12, 14**, it concluded that the relevant principles to be applied by the courts were these:

[33] [1] On any occasion the District Court could not impose a sentence greater than seven years’ imprisonment:

[2] Such a sentence may be consecutive to a sentence passed previously which is being served by the accused;

[3] In order to assess the correct sentence, it is permissible for a judge to adopt as a starting point a total sentence of more than seven years if the offence or offences warrant such a sentence, but he may not impose a sentence of more than seven years;

[4] If the sentences are imposed after plea, the starting point may be more than seven years but if the sentence after discount is seven years or more, the full seven years should not be imposed as this deprives the accused of any benefit from his plea of guilty;

[5] Therefore, in cases which merit a sentence of seven years or more after discount for plea, a further discount should be given.”

[34] Leaving aside the matter of discount for a plea, the general thrust of this ruling is that a District Court Judge in Hong Kong is not entitled to impose a sentence in excess of his jurisdictional limit of seven years.

[35] I accept that this appeal court judgment from Hong Kong is persuasive rather than binding. However if this principal was to be applied to the present case, it follows that the statutory minimum sentence of 15 years imprisonment imposed would not stand and a sentence of 10 years imprisonment or less should be substituted.

FINDINGS

- [36] The Appellant was charged with the offence of Attempted Robbery, not robbery. Notwithstanding section 27 of the Penal Code, while the substantive charge can attract a term of 18 years imprisonment the lesser charge of attempted robbery carries a lower potential penalty of 14 years imprisonment.
- [37] The Appellant pleaded guilty to the charge and admitted the facts. He admitted that he had one previous conviction for stealing. It appears that the Magistrate accepted that this was not a similar offence within the meaning of section 27 of the Penal Code and took the Appellant as a first offender. She followed the provisions of section 27[1][c][i] and imposed a term of 15 years imprisonment which is the minimum mandatory sentence.
- [38] It is against this sentence that the Appellant now appeals.
- [39] In her reasons for sentence the Senior Magistrate states that she takes into account the plea of guilty. However she does not state that she gave consideration as to whether the plea of guilty would entitle the Appellant to a discount or reduction in sentence.
- [40] The Senior Magistrate found no exceptional or extraordinary reasons to deviate from the minimum mandatory sentence and imposed a term of imprisonment of 15 years. In doing so she disregarded the provisions of section 6 of the Criminal Procedure Code which limits her sentencing powers to a period of 10 years imprisonment.
- [41] It is my opinion the Senior Magistrate erred in taking this approach. Section 6 of the Criminal Procedure Code governs her sentencing powers in the magistrate's court. The Senior Magistrate is only entitled to sentence within the parameters set out in this section. The marginal note, although not part of the section reads "Sentences which the Magistrates Court may pass". Section 6 does not refer to or make exception in relation to section 27 of the Penal Code. In my opinion where there is this conflict between the two sections the general sentencing provisions of section 6 take precedence and prevail. This would also bring it into conformity with the principles enunciated in the Li Yan case.

[42] I find that the Senior Magistrate in imposing the sentence of 15 years imprisonment exceeded her powers.

[43] The “excess of power” point was fully discussed in the case of **R v Cain (1985) AC 46, HL.**

[44] This point is also referred to in para 7-136 of Archbold 2012 edition at item [i] which reads as follow:

[i] *Where the sentence was not justified by law.*

“The court of appeal will quash any sentence if the Crown Court, in imposing it, has exceeded the power conferred on it by Parliament....”

[45] In the present matter the Magistrates Court in Seychelles is in a similar position to the Crown Court in England.

[46] In his judgement in the Cain case Lord Scarman held that an order made by a court in excess of its statutory powers is not a nullity but will stand until it is set aside by an Appellate Tribunal. I find that in the present case the Senior Magistrate acted in excess of her statutory powers. I find that there are substantial and compelling reasons to look again at the sentence imposed by the Senior Magistrate. The existing sentence cannot stand.

[47] I take into account the nature of the offence itself, the circumstances thereof and the plea in mitigation. The agreed facts indicate that this was an unexpected and vicious attack which did not fully succeed only through the vehemence of the defence put up by the victim. This attack was at the upper level of seriousness for this offence. The only mitigation factor is the plea of guilty.

[48] I now consider the appropriate sentence. I take as a starting point 15 years imprisonment. Reference to the permissible reduction of a minimum mandatory sentence in England following a plea of guilty can be found in paras 5- 455 and 5-107 of Archbold 2012. In these circumstances a court is entitled to consider a reduction of not less than 80 percent of the sentence prescribed. In other words a court is entitled to give a discount up to 20

percent. I give this Appellant such a reduction which would amount to 3 years. This reduction to 12 years still leaves the sentence above the Senior Magistrate's limit. When I asked Mr Roberts for his comments on the appropriate sentence in the light of section 6 he submitted that it was still open to this court to impose the full 15 year term. However in my view it would not be legal, just or equitable to follow this course.

[49] This Appellant in all the circumstances is entitled to expect a sentence which falls within the jurisdictional sentencing limit of the Senior Magistrate. I also take into account that the Appellant pleaded guilty. I follow principles 4 and 5 as set out in the Li Yan case and I consider that a further reduction in sentence would be appropriate to bring it within the jurisdictional limit of the Senior Magistrate. This discount has to be meaningful where there is a plea of guilty and the court in Li Yan considered it would be rare that the discount be less than one year.

[50] I grant this Appellant a minimum discount of one year from the jurisdictional limit of 10 year imprisonment. I find that the appropriate sentence to be imposed is 9 years imprisonment.

[51] Accordingly I quash the sentence of 15 years imprisonment imposed on the Appellant and substitute a sentence of 9 years imprisonment.

Signed, dated and delivered at Ile du Port on 16 January 2014

C McKee
Judge of the Supreme Court